Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-933

THADDEUS M. OHRYNOWICZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioner, Thaddeus M. Ohrynowicz, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Southern District of Illinois, Southern Division, finding defendant guilty of violating 18 U.S.C. §§1341 and 1342.

This cause arose out of an eleven-count criminal indictment against Petitioner and one Robert Strauss, charging that they had entered into a check kiting scheme which constituted mail fraud in violation of Title 18 United States Code, Sections 1341 and 1342. The case was tried before a jury, which returned a verdict of guilty. Judgment was entered on the verdict and defendant sentenced to a total of seven years' imprisonment. The judgment was affirmed by the Court of Appeals.

OPINION BELOW.

The opinion of the Court of Appeals is as yet unreported, and is reproduced in the Appendix to this Petition. Since the decision in this cause was based upon the earlier opinion of the Court in the case involving Robert Strauss, that opinion, also as yet unreported, is reproduced in the Appendix. The District Court for the Southern District of Illinois, Southern Division, did not file a written opinion.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 21, 1971. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether a use of the United States Mails, by a third person, on his own initiative and without the knowledge or approval of the defendant to clear a check deposited in a bank, and drawn upon another account, may constitute a mail fraud, when it was not in the ordinary or usual course of business for the mails to be used for such purpose, and could not have been anticipated by defendant.

STATEMENT OF THE CASE.

Robert S. Strauss and Thaddeus Ohrynowicz were named in an indictment charging violation of Title 18, United States Code, Sections 1341 and 1342. Defendant Thaddeus Ohrynowicz was tried alone on this indictment and found guilty by a jury. Judgment was entered upon the jury's verdict.

The indictment consisted of eleven counts. It alleged that from on or about September 1, 1967, to approximately September 15, 1967, Robert Strauss and Thaddeus Ohrynowicz had devised a scheme to defraud or obtain money by false pretenses, namely, a check manipulation procedure commonly known as a "check kiting scheme." It was alleged in the indictment that defendants had opened a number of checking accounts in certain named banks in Bloomington, Decatur, Normal and Springfield, Illinois, and that the defendants "would and did write, or cause to be written, checks drawn on one of the accounts previously opened at one of the banks listed . . . in excess of the amount on deposit, payable to one of the other account names in one of the other banks." It was not alleged that either of the defendants had in fact written or attempted to negotiate any check wherein the account upon which it was drawn did not have sufficient funds for the payment of such check. In Counts I and III of the indictment, it was alleged that in furtherance of this scheme, defendants had caused letters containing check orders to be sent via the mails. In Counts II and IV, it was alleged that the defendants caused advice letters transmitting checks to be sent from one bank to another bank. In subsequent counts, it was alleged that for

the purpose of promoting and carrying on by means of the postal establishment of the United States this scheme, defendant Ohrynowicz used various assumed names and trade styles. In Count XI of the indictment, it was alleged that the defendants had conspired to devise and carry out the scheme previously alleged.

At the time of the trial, the prosecution elected not to proceed against defendant Ohrynowicz on Counts V, VIII and X. (A. 71) This defendant was tried and found guilty of conspiracy, while the government had dismissed the conspiracy count when co-defendant Strauss was tried alone. (A. 73)

Various witnesses testified that both the defendant Thaddeus Ohrynowicz and Robert Strauss had opened checking accounts in the banks in which they were employed, that they had subsequently deposited checks drawn upon other of these accounts, some of which were cashed for sums in excess of the initial deposit of $500.00. None of the witnesses testified that the bank for which they worked had lost any funds.

Four witnesses testified that defendant had opened accounts with them, and that as a part of opening the account, they had sent orders for blank checks to a printing company through the mails. (Tr. 60, 93, 115, 149) The only witness who testified to any other use of the mails involving Ohrynowicz was the Assistant Cashier at the First National Bank of Normal, Normal, Illinois, who stated that a check was returned insufficient funds by mail. All of the other uses of the mails testified to concerned defendant Strauss.

Milton Brahier, Supervisor of Tellers of the Millikin National Bank of Decatur, testified that defendant Strauss

attempted to cash a check, but that they refused to give him any cash on it. Rather, they took the check for deposit and allowed Strauss to write a check for $500.00 on the account, which was the amount in the account at the time. He then testified that the check which had been deposited was sent through the mails for collection, via special cash letter. This was his own idea, as some checks are sent by courier and some are sent by mail. (A. 90-6)

Thomas E. Bowman, connected with the Citizens National Bank in Decatur, testified that checks between Decatur and Springfield are normally cleared through a private courier service. (A. 83) He further testified that his bank never uses the mails to determine if there are sufficient funds in an account on which a check is drawn. (A. 87)

Ronald Hovermale, Assistant Cashier at the Springfield Marine Bank, testified that he sent a check deposited by Strauss to the drawee bank for collection, through the mail, and the check was returned by mail, marked insufficient funds. Another check which had been deposited by Strauss had been sent through the clearing house without the use of the mails. (A. 99, 101) He testified that most of the items sent by his bank are sent by private courier, which takes the items direct to the clearing house in Chicago by automobile or truck. In the normal course of business, their check clearings are not done by mail. (A. 109) The normal amount of time for a check to clear between Normal and Springfield, Illinois, would be three days. By using the mails, this process took only two days, which was the reasor for using this procedure. When they sent the check by mail, they had already checked with the drawee bank to determine the status of the account, and knew what the answer would be when the check was received by that bank. (A. 112)

Thomas W. Stephans, Head Teller at the Capital Bank of Springfield, who had contacted the police, stated that the check deposited by Strauss in his bank had gone through the usual clearing house in Springfield, by courier, and the mails were not used. (A. 120)

The charges placed against defendant by the State of Illinois at the time of his arrest had been dismissed.

Defendant's motion for acquittal at the close of the government's case was denied. The jury returned a verdict of guilty, upon which judgment was entered. Defendant's motion for acquittal and in the alternative, for a new trial, were denied. (A. 8) Defendant was sentenced to five years on each of Counts 1, 2, 3, 4, 6, 7 and 9, to run concurrently, and to two years under Count 11, to run consecutively from the five year sentence, a total of seven years imprisonment. (A. 8-9)

The Court of Appeals, relied entirely upon its opinion in the *Strauss* case. In that case, the Court held that the independent action of two bank officials in sending two checks through the mail for collection could reasonably have been anticipated by defendant, even though, "it was not the normal practice of these banks to utilize the mails in the bank collection process."

Even though the applicable statute requires that the mailing be "for the purpose of executing" the scheme, the Court held that this mailing contributed to a time lag, which was intended to aid in avoiding detection, despite the testimony of government witnesses that the only reason the mails were used was to shorten the time lag in clearing the checks.

REASONS FOR GRANTING THE WRIT.

THE GOVERNMENT FAILED TO PROVE A USE OF THE MAILS BY DEFENDANT IN FURTHERANCE OF THE ALLEGED SCHEME.

The Government proved at the trial that defendant had participated in a chain of events which consisted of opening an account at several banks with $500.00 cash, and subsequently presenting a check for payment drawn upon other of the accounts in excess of the amount which was credited to such account. The evidence is absolutely clear that the use of the mails was not a part of this scheme. No bank suffered any loss by reason of any act by defendant.

The statute involved herein, 18 U.S.C. §1341, states, in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined . . ."

There is no question that defendant neither placed nor received any matter whatsoever from the mails. Therefore, in order to make out the offense herein, the government had the burden of proving, beyond a reasonable doubt, that defendant knowingly caused some matter or thing to be delivered by mail. The evidence shows that defendant

neither caused any matter to be delivered by mail nor was any mailing whatsoever a part of the scheme alleged in the indictment.

There were only two uses of the mails proved by the Government which were relevant to the charges in the indictment. These consisted of two checks which were sent from one bank to another.

Milton Brahier testified that after co-defendant Strauss had deposited a check in the Millikin National Bank, he had sent the check to the drawee bank, the Illinois National Bank, on a special cash letter. Instead of sending it through normal banking channels, the check was sent directly through the mails to speed up the transaction. Defendant did not request this treatment of the check, and Brahier, in his sole discretion, made the decision to treat the check in this manner. The government attempted to bolster its case by leading Brahier to state that it is normal practice for his bank to send checks through the mails for collection if there is any question of the sufficiency of funds in the account. (A. 93) However, Brahier admitted that some checks are sent by courier and some by mail. Indeed, this evidence proves too much, for if there were any question of the sufficiency of the funds in the account, the alleged scheme would not be successful, as the bank's suspicion would have been aroused, the last thing defendants would have wanted to occur.

Ronald Hovermale of the Springfield Marine Bank testified that he noticed that a check deposited by defendant had been cashed on uncollected funds and he mailed the check directly to the First National Bank in Normal, Illinois. This speeded up the collection process by one day. (A. 112) Again, the decision to treat the item in this man-

ner was made at the complete discretion of the bank officials, and was not requested by defendant.

Thomas Stephans testified that when checks are normally sent through the clearing house, they are not sent through the mails. (A. 120)

Thomas Bowman of the Citizens National Bank in Decatur testified that checks between Decatur and Springfield are normally cleared through a private courier service, and that his bank never uses the mails to clear checks, even if there are insufficient funds in an account upon which a check is drawn. (A. 83, 87)

Each one of these witnesses were called by the government.

It is a jurisdictional prerequisite that defendants knew or reasonably believed or contemplated that these checks would be sent by mail. As was said in *Huntley* v. *Schilder*, 125 F. 2d 250, 251 (10th Cir. 1942):

> "The fraud charged in the indictment is not within the jurisdiction of the Federal Court unless it is also charged that the petitioner used the United States mails for the purpose of executing such scheme or artifice, or attempting to do so. The use of the mails is a jurisdictional prerequisite to the offense."

It is federal policy that state crimes be prosecuted by the State Courts. Federal jurisdiction is strictly limited by the Constitution, and here by the statute itself. The State of Illinois chose to drop the charge against defendant. The federal prosecutor must not be allowed to belatedly resurrect old charges in a federal guise.

The element of knowledge that the mails will be used is essential.

> "In this case the defendants are correct in asserting that their indictments were required to cover the element of knowledge that their actions would cause a use of the mails, since if the only use of the mails caused by their fraudulent conduct had been unanticipated and incidental, they would not have violated the mail fraud statute. In interpreting Section 1341, courts have established the rule that for a scheme to come within the reach of that provision it must have 'reasonably contemplated' a use of the mails."

It cannot be said that defendants must have known that the checks they deposited with the banks would move through the mails. The banks they were alleged to have dealt with were not in far-distant cities. They were all within a small radius. Three were in Bloomington, Illinois, three were in Decatur, Illinois, one in Normal, Illinois, and five were in Springfield, Illinois. It is just as reasonable to assume that checks sent between these banks would have been sent by messenger as by the United States mails. The use of the mails was no integral or necessary part of the alleged scheme. An incidental, unforeseen use of the mails is not sufficient. As was said recently by this Court:

> "". . . these were essentially state crimes and could become federal ones, under the mail fraud statute, only if the mails were used 'for the purpose of executing such scheme.' Hence, the question is whether the uses of the mails that were charged in the indictment and shown by the evidence properly may be said to have been 'for the purpose of executing such scheme,' in violation of §1341."

Furthermore, the allegations of the indictment show that any use of the mails was made after the scheme was completed, if any scheme there was. In such a situation, no

crime has been made out. *United States* v. *Dale*, 230 Fed. 750, 751 (N.D. Cal. 1915).

This specific subject was considered in *Dyhre* v. *Hudspeth*, 106 F. 2d 286, 288 (10th Cir. 1939), where the court held:

> "The fraud charged in each of these counts standing alone is not within the jurisdiction of the federal court, but it may be brought within that jurisdiction by charging that defendant used the United States mail 'for the purpose of executing such scheme or artifice or attempting to do so'. That was charged here, but the charge clearly shows that the United States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until after the defendant had induced the parties named to accept his fraudulent check for merchandise. He had thus accomplished all he set out to do in falsely representing that he had money on deposit in the banks."

It is therefore evident that if there was any use of the mails, it was done after the alleged scheme had been completed. No use of the mails by defendants themselves were alleged or proved. No facts were alleged or proved to support the accusations that defendants caused the checks to be sent by mail.

It is clear that none of these checks were caused to be mailed by defendant, and furthermore that such mailing could not have been part of defendant's alleged scheme. "That the use of the mail is the gist or corpus of the crime is so well established as to require no citation of authority, and must, of course, the same as other essential elements, be proven beyond a reasonable doubt." *Mackett* v. *United States*, 90 F. 2d 462, (7th Cir. 1937). "[I]t is not the scheme

to defraud which the federal statute condemns but only the use of the mails in its execution. It is that use which constitutes the *corpus delicti* of the offense." *United States* v. *Browne,* 225 F. 2d 751, 757 (7th Cir. 1955); *Munch* v. *United States,* 24 F. 2d 518, 519 (5th Cir. 1928).

The testimony of the witnesses for the government shows beyond any reasonable doubt that the use of the mails proven by the government was not, and could not, have been part of the scheme alleged by the government. A check kiting scheme depends upon delay. Such a scheme can only work if the bank to which is check presented for payment has not yet become aware of the fact that the check previously deposited in that account is worthless and will not be paid by the drawee bank. Thus, the more delay, the better the possibility of success. The unequivocal testimony of Brahier and Hovermale was that the mailing of the checks was for the sole purpose of speeding up the collection process, thus attempting to thwart the scheme. The use of the mails was not a part of the scheme, but a means of stopping it. The use of the mails here was not and could not have been a part of the execution of the scheme. This is not a situation such as that present in *Moffiti* v. *United States,* 154 F. 2d 402, 406 (10th Cir. 1946), *cert. denied,* 66 S. Ct. 1343, where the collection of the check by the bank in which it was deposited was a necessary element of the success of the scheme. Just the opposite, collection of the item was the one thing which would stop it cold. Nor can defendant be charged with knowledge that the usual method of collecting items such as this was the use of the mails, as this was not the case.

Rather, the situation is more akin to the following situation discussed in *Moffitt,* supra:

"It cannot, however, be said as a matter of law that it is a well established custom, of which men of ordinary business experience would have knowledge, that banks require, in addition to the ordinary and customary notification, further notification by telegram and further confirmation of the telegram by mail. There is no evidence in the record that this was the usual and ordinary practice followed by the Blackwell Bank in handling collection items, and there is a complete absence of any evidence that appellant was informed of such a custom or that such a procedure would be followed in this instance. He had no reason, therefore, to believe or know when he deposited the check for collection that such a telegram would be required, or that if it was required that a further letter also would be mailed confirming the telegram. The telegram and letter confirming it were not ordinary, usual, or customary links in the chain of events which he set in motion by depositing the check for collection. It follows that he did not use or cause the mails to be used by the correspondent bank in sending the letter confirming the telegram. His motion for a directed verdict as to Count 3 should have been sustained."

So here, defendant cannot be held to have reasonably anticipated that the mails would be used when he negotiated the check. There is no evidence that this is the usual practice. Indeed, the witness Brahier, supervisor of tellers at the Millikin National Bank, whose decision it was to forward the check by mail, testified that some checks are cleared through the mails and some are not. (A. 96) If a person in the industry does not have such knowledge, it cannot be charged to defendant. As a matter of fact, in the normal and usual course of business, the mails would not have been used.

There is yet another basis for finding the evidence against defendant insufficient. It is clear that the use of the mails occurred after the completion of the scheme. When the use of the mails occurs after the completion of the scheme, it is not for the purpose of executing the scheme and is not an offense under the statute. *Bliss* v. *United States*, 354 F. 2d 456 (8th Cir. 1966).

This proposition is most forcefully demonstrated in *Kann* v. *United States*, 323 U.S. 88, 65 S. Ct. 148 (1944). Defendant there was charged with attempting to defraud a corporation of which he was president. That cause, too, involved the cashing of checks in one bank which subsequently mailed the check to the drawee bank. The language of the Court holding that the scheme had been completed upon the receipt of the money by the defendant from the bank, and that the subsequent mailing of the check to the drawee bank occurred after the completion of the scheme is dispositive of this case:

> "The remaining contention is that the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The check delivered to the five defendants by the building contractor in payment for timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check. The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed and credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or

> to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

The essence of the alleged scheme was to receive money to which he was not entitled. Once he had received the money, the scheme was completed. What the banks did with the check after he had cashed it was entirely immaterial to him. The collection of the check from the drawee bank was no part of the scheme, and any step toward that end could under no theory be a part of executing the fraud. As was said in *Parr* v. *United States*, 363 U.S. 370, 389, 80 S. Ct. 1171, 1183 (1960):

> ". . . as its terms and purpose make clear, the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

CONCLUSION.

It is clear that no federal crime was involved in this cause. Federal jurisdiction is limited, both by Constitution and statute. The Government strained with all its might to find a federal offense here, but the evidence shows that it was unable to do so. Any scheme which might have been concocted by defendant was, at most, an offense against the State of Illinois, which elected to drop the charges. The mails were not an integral, or even peripheral, part of the

scheme alleged in this indictment. Any use of the mails was not for the furtherance of this scheme, but was the result of independent action by third parties, outside the normal and usual course of business, to halt what they thought might be a scheme. Clearly the view of the trial judge, that anything done to stop the scheme was a part of the scheme, upheld by the opinion of the Court of Appeals, was contrary to all reason and justice.

Federal Mail Fraud is a strictly and clearly defined crime. It is a negation of federal policy to twist this statute to cover an alleged crime which it was never meant to cover. The federal judiciary must abide by its own rules and the federal statutes. This Court must vindicate that policy here, as it has done in the past. The Court is not asked to award medals, but to protect the accused from judicial abuse.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 21, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 71-1108 vs.

THADDEUS M. OHRYNOWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.
Criminal No. 6807
Honorable OMER POOS, *Judge.*

ORDER

Defendant was indicted jointly with Robert S. Strauss for participation in a check-kiting scheme involving some twelve banks in Illinois. Because Ohrynowicz could not then be found, Strauss was tried alone before a jury on May 5, 1970. He was found guilty on five counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342 and received an eight-year sentence.

Ohrynowicz was found in Canada on June 19, 1970. His trial commenced on November 5, 1970, and a jury convicted him on all eight counts on which he was tried under 18 U.S.C. §§ 371, 1341, and 1342. He received a total sentence of seven years.

On September 15, 1971, this Court handed down its opinion affirming Strauss' conviction (No. 18890), and his petition for rehearing was denied on October 14, 1971. On Ohrynowicz' appeal, he raises the same points as were involved in Strauss' appeal. For the reasons given on our opinion in the *Strauss* case, Ohrynowicz' appeal is likewise without merit. See also *United States* v. *Cassell, et al.* (Nos. 18289-18291, 7th Cir., decided October 6, 1971).

The judgment of the district court is affirmed.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18890

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT S. STRAUSS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

September 15, 1971

Before KILEY and CUMMINGS, *Circuit Judges* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior Judge.* The defendant, Robert S. Strauss, was indicted jointly with one Thaddeus M. Ohrynowicz for participation in a check-kiting scheme involving some twelve banks located in Illinois. Strauss was tried alone before a jury and was found guilty on five counts of mail fraud in violation of 18 U.S.C. §§ 1341, 1342. Judgment of conviction was entered upon the verdict and consecutive sentences[1] totaling eight years were imposed.

Except for the defendant's claim that the government failed to establish beyond a reasonable doubt a use of the

* Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

[1] On each of the counts charging violations of 18 U.S.C. Sec. 1341 the defendant was sentenced to five years, the sentences to run concurrently. On each of the counts charging violations of 18 U.S.C. Sec. 1342 the defendant was sentenced to three years, the sentences to run concurrently. The five year sentences and the three year sentences were ordered to run consecutively, for a total sentence of eight years.

mails by the defendant in furtherance of the alleged scheme to defraud, the sufficiency of the evidence is not challenged on appeal. Thirty-six witnesses testified and each of them, in varying degrees, implicated the defendant in the check-kiting scheme. The defendant did not testify or otherwise present any evidence on his own behalf. In addition to the question regarding the use of the mails, the defendant also contends that he was denied his constitutional right to a speedy trial and that the district court erred in denying his motion to suppress certain articles seized from the automobile of Thaddeus Ohrynowiez and introduced into evidence during the defendant's trial. Another ground for reversal urged by the defendant is the claim that the indictment did not adequately charge an offense under 18 U.S.C. § 1341.

The offenses charged in the indictment were allegedly committed during a period from September 1, 1967 to approximately September 15, 1967. The defendant's arrest by State authorities followed almost immediately as did his return to the custody of the United States Marshal. His parole on a prior federal sentence was revoked and the defendant was returned to the United States penitentiary at Terre Haute, Indiana. The indictment in this cause was not filed until September 19, 1968, slightly more than one year after the commission of the offenses. A detainer was then immediately lodged against the defendant at the place of his incarceration. Approximately another year later the defendant was brought to Springfield, Illinois and arraigned on the charges contained in the indictment. The motion to dismiss, based on Rule 48 (b)[2] and the sixth amendment right to a speedy trial, was not made until about five months after arraignment. The trial commenced some three months later.

Arguing that he was prejudiced by the "unnecessary" one year delay in presenting the charge to the grand jury, the defendant contends that the district court erred in denying his motion to dismiss. He also claims that the

[2] Rule 48 (b), F.R.Crim. Proc., provides: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

post indictment delay of approximately one and one-half years deprived him of his right to a speedy trial. In determining whether the constitutional assurance of a speedy trial has been breached, consideration must be given to the length of the delay, the reasons for the delay, the reasonable possibility of prejudice to the accused, and whether the accused can be said to have waived the right. *United States* v. *Perez*, 398 F.2d 660 (7th Cir. 1967). With particular reference to pre-indictment delays, this Circuit has adopted the rule that the trial court should dismiss the indictment only if the accused can demonstrate that he has been prejudiced by the postponement. *United States* v. *Lee*, 413 F.2d 910, 913 (7th Cir. 1969); *United States* v. *Hauff*, 395 F.2d 555, 557 (7th Cir. 1968). Only where some evidence of prejudice has been presented is a burden placed on the government to explain the delay. Here, no prejudice, other than by way of general assertion, is even claimed by the defendant. It is not argued, for example, that the passage of time dimmed the memories of the witnesses or caused the disappearance of any possible witnesses for the defendant. No claim is made that the defendant was embarrassed or hindered in the preparation of his defense. The assertion that the possibility of a concurrent sentence with the defendant's prior sentence was lost as a consequence of the delay must be viewed as conjectural, if not frivolous, in light of the imposition of consecutive sentences in the case.

Although no prejudice has been shown here, the government nevertheless commendably offers an explanation for the delay. Prior to indictment, the government represents that much time was necessary to enable the Post Office Inspectors to investigate the facts and to gather evidence for presentation to the grand jury. Since the alleged scheme involved twelve banks located in four different Illinois towns and since there were numerous potential witnesses, it seems that the investigatory pre-indictment delay is a satisfactory explanation by the government. *United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2nd Cir. 1967). We are not dissuaded from this conclusion by the defendant's gratuitous argument that since his prior federal parole was revoked so shortly after his arrest,

facts sufficient to indict the defendant must also have been then available to the United States Attorney, thus rendering any delay "unnecessary." In this respect, what was said in *United States* v. *Feinberg*, 383 F.2d 60 at 67 (2nd Cir. 1967) is applicable here:

> "It would be unwise to impose on the judiciary the inquisitorial function of scrutinizing the internal operations of law enforcement agencies when no possible prejudice to the accused has been shown."

Concerning the post-indictment delay of approximately a year and one-half, the government submits that the delay is attributable only to its desire to try the defendant with Thaddeus Ohrynowicz who was jointly indicted with him and who was a fugitive during this period. Indeed had the government waited but two months longer, when Ohrynowicz was finally apprehended, the two men could have been tried jointly. Considering the absence of any demonstrated prejudice as well as the intricate involvement of both men in the alleged scheme to defraud and the interest of prosecuting both men at the same time, we believe this explanation to be reasonable. Thus, the district court did not err in refusing to grant the defendant's motion to dismiss the indictment on these grounds.

The defendant next argues that it was error for the district court to deny his motion to suppress certain articles seized from the automobile of Thaddeus Ohrynowicz and later introduced during his trial. The material seized consisted of numerous checks, deposit tickets and receipts in the names of various accounts with Illinois banks, a check protector and a typewriter. It is contended that at the time of Ohrynowicz' arrest and the subsequent search of the vehicle, the police were not armed with sufficient factual information to support a finding of probable cause for arrest without a warrant. No challenge to the scope of the search is made and we therefore must confine our inquiry to the question of whether probable cause was present when the vehicle was searched.

The record discloses that on September 13, 1967, Detective William Ascher of the Springfield Police Department was summoned to the Capitol Bank in Springfield

and there spoke with Thomas Stephens, a bank official. The detective was informed that the Bank had been victimized by a checking account scheme wherein several days previously an individual, later identified as the defendant, came into the Bank and opened a checking account with a $500.00 cash deposit. A day later the defendant returned, deposited a check and withdrew the original deposit. The following day, September 13, 1967, the defendant attempted to deposit another check and with it attached a cash-out (*i.e.*, withdrawal) ticket in the amount of $900.00. Because the check deposited by the defendant on the second day had been dishonored, Mr. Stephens informed the defendant that the Bank could not allow him to withdraw any additional funds from his account. He then hurriedly departed the Bank. Through the assistance of a customer of the Bank who had seen the defendant and another man speed away from the Bank in a car, Mr. Stephens was able to give Detective Ascher a description of the two men and the automobile, as well as the vehicle's license number. This information as well as the nature of the scheme was then communicated to police headquarters and broadcast over their radio system. When Detective Ascher contacted his office he was informed that one of the men he had described had been arrested at the First National Bank of Springfield for his suspected involvement in the same type of scheme to defraud. Ascher was also told by his office that two other Springfield banks had reported the occurrence of similar frauds earlier that morning. A short time later the detective was notified that the car in question was seen in downtown Springfield parked and unoccupied in the vicinity of another bank. After proceeding to this area, the detective, in the company of other police officers, observed Thaddeus Ohrynowicz enter the automobile and commence to drive away. The officers then stopped the car, placed the driver under arrest, and searched the vehicle, discovering the materials later introduced at defendant's trial.

We agree with the defendant that the standard for reviewing a police officer's assessment of probable cause prior to a warrantless arrest should be no less stringent

than that employed by a court in reviewing a magistrate's determination prior to the issuance of a warrant. *Whiteley* v. *Warden*, 39 U.S.L.W. 4339, 4341 (1971); *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964). We find that the circumstances here justify such a finding of probable cause. The motion to suppress was properly denied.

The sufficiency of the indictment to charge an offense is next challenged in two respects. First, it is contended that the indictment is fatally defective because it fails to name the victims or the intended victims of the alleged offense. A second defect is raised through the contention that a use of the mails by the defendant was not charged in the indictment. Neither contention has merit. With regard to whether the "victims" of the scheme were named, the indictment, following a thorough description of the nature of the check manipulation procedure, sets out the names of twelve banks at which checking accounts were opened. Although the descriptive word "victim" is not used, a reasonable construction of the indictment, considered as a whole, leads to the conclusion the banks named were indeed the intended "victims" of the fraud. The indictment adequately apprised the defendant of the nature of the charge against him and was sufficient to permit the defendant to plead the judgment as a plea in bar to a subsequent prosecution for the same offense. See *Collins* v. *Markley*, 346 F.2d 230 (7th Cir. 1965).

Concerning the claim that a use of the mails was not alleged, we observe that most of the defendant's argument on this point is directed to the government's evidence of mailing, rather than to the sufficiency of the allegations contained in the indictment. The indictment alleges that "for the purpose of executing the aforementioned scheme and artifice to defraud and attempting to do so" the defendant "caused to be mailed" by certain of the named banks "advice letters" (bank collection letters) transmitting checks signed by the defendant under fictitious names and drawn on another of the named banks. Both the drawee banks and the banks transmitting the advice letters were specifically identified. Clearly the use of the mails and the relationship of these mailings to the fraudulent scheme was set forth in the indictment. The

defendant's "causing" the use of the mails was also stated. That this was done "knowingly" by the defendant is adequately charged by the phrase "for the purpose of executing the scheme." *United States* v. *Richman*, 369 F.2d 465, 467 (7th Cir. 1966). The defendant's suggestion that the indictment did not allege that advice letters contained any misrepresentations is without merit since it is not necessary that the false representations were themselves transmitted by mail. *Anderson* v. *United States*, 369 F.2d 11 (8th Cir. 1966), cert. denied 386 U.S. 976; *United States* v. *Hopkins*, 357 F.2d 14 (6th Cir. 1966), cert. denied 385 U.S. 858. We find that the indictment here was proper.

Lastly, defendant argues that the government failed to meet its burden of proving a use of the mails, particularly in that the government's proof did not show that defendant did anything to "cause" the use of the mails and that any mailing which did occur was not an integral part of the scheme to defraud because the alleged mailings took place only after the completion of the scheme. The Supreme Court disposed of this argument in its opinion in *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1953) wherein it stated:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, *or where such use can reasonably be foreseen, even though not actually intended*, then he 'causes' the mails to be used." [Emphasis added] See also *United States* v. *Lowe*, 115 F.2d 596, 598-599 (7th Cir. 1940).

Measuring the defendant's acts by this standard, it can readily be seen that the defendant caused the mails to be used. The defendant together with his accomplice opened checking accounts in twelve banks located in four different cities. Although, it was not the normal practice of these banks to utilize the mails in the bank collection process, the evidence shows the practice of sending advice letters through the mails was not an isolated one and could reasonably have been anticipated under the circumstances. *United States* v. *Brickey*, 426 F.2d 680 (8th Cir. 1970); *United States* v. *McConaky*, 294 F. Supp. 1 (E.D. Wis. 1969).

Relying on *Parr* v. *United States*, 363 U.S. 370 (1960), *Kann* v. *United States*, 323 U.S. 88 (1944), and *Dyhre* v. *Hudspeth*, 106 F.2d 286 (10th Cir. 1939), the defendant contends that the fraudulent scheme was complete upon presentation and payment of the insufficient funds checks and that therefore the mailings occurred after completion of the scheme and thus there was no violation of the mail fraud statute, 18 U.S.C. § 1341. However, the Supreme Court has also said that neither *Kann* nor *Parr* announced an inflexible rule that the use of the mails after the victims' money had been obtained can never be for the purpose of executing the fraud. *United States* v. *Sampson*, 371 U.S. 75, 80 (1965). Here the use of the mails "caused" by the defendant provided or contributed to a time lag which was intended to aid in avoiding detection. See *United States* v. *Becker*, 411 F.2d 306 (4th Cir. 1969); *United States* v. *Hendrickson*, 394 F.2d 807 (6th Cir. 1968). The mailing, established by the evidence, we find to have been an integral part of the scheme to defraud.

The judgment of the district court is affirmed.

No. 71-933

In the Supreme Court of the United States

OCTOBER TERM, 1971

THADDEUS M. OHRYNOWICZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted on eight counts charging conspiracy and mail fraud, in violation of 18 U.S.C. 371, 1341, 1342. He was sentenced to a total of eight years' imprisonment. The court of appeals affirmed by order on October 21, 1971, relying on its opinion affirming the conviction of petitioner's co-indictee, Robert

Strauss (Pet. App. A).[1] The petition for a writ of certiorari was not filed until January 18, 1972, and is substantially out of time under Rule 22(2) of the Rules of this Court.

Petitioner's sole contention is that the proof failed to show a use of the mails in furtherance of the illegal check kiting scheme. This claim is fully answered in the opinion of the court of appeals affirming *Strauss'* conviction (Pet. App. B), on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972

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[1] Strauss has filed a separate petition for a writ of certiorari (No. 71-908) to which we have filed a separate response.

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Petitioner,

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Government has failed to show that Petitioner has committed a federal crime. No attempt whatsoever is made to support the ruling of the Court of Appeals. Petitioner was charged with causing the mails to be used in furtherance of a scheme to defraud. The testimony pre-

sented by the Government established that the bank personnel involved in the alleged check kiting scheme did not know that the mails would be used in the process of clearing the checks deposited by Petitioner. If the personnel responsible for the clearing of the checks did not know that the U.S. mails were to be involved, how can it be said that Petitioner is charged with knowledge that use of the mails would follow in the ordinary course of business, or could be reasonably foreseen? Indeed, the Court of Appeals recognized that "It was not the normal practice of these banks to utilize the mails in the bank collection process." . . .

The Court of Appeals completely ignores the ruling of this Court in *Kann v. United States*, 323 U.S. 88 (1944) and *Parr v. United States*, 363 U.S. 370 (1960), discussed in the Petition for Certiorari. The reliance of the Court of Appeals' opinion upon *United States v. Sampson*, 371 U.S. 75 (1965) is obviously misplaced. In that case, the mails had been used by the defendant "for the purpose of lulling [the victim] by assurances that the promised services would be performed," even after the defendant has obtained the money from them. There was no such use of the mails here. Accidentally and incidentally and through no action or intent of petitioner, the mails were used to clear two checks which had been deposited by Petitioner. This clearing of checks was not part of any scheme alleged by the Government, and by its terms could not be used to further the scheme as alleged in the indictment.

The mail fraud statute contains clear and specific limitations. These limitations must not be ignored whenever

it suits the government to do so. To repeat what this Court has said in *Parr v. United States*, 363 U.S. 370, 389, 80 S. Ct. 1171, 1183 (1960):

> ". . . as its terms and purpose make clear, the federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The State of Illinois elected to dismiss the charges placed against Petitioner arising out of the series of events involved herein. The Government has failed to prove violation of any federal statute. The Government has further failed to find any defense for the obviously erroneous decision of the Court of Appeals.

Finally, the Government has noted, in passing, that the Petition for Certiorari was not filed within 30 days after the final decision of the Court of Appeals. This Court has held on numerous occasions that the provisions of Rule 22(2), Supreme Court Rules, is not jurisdictional. *Durham v. United States*, 401 U.S. 481, 91 S. Ct. 858, 859 (1971). Such rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64, 90 S. Ct. 1555, 1559 (1970); *Taglianetti v. United States*, 394 U.S. 316, 89 S. Ct. 1099, 1100 (1969). This is obviously such a case.

It is respectfully submitted that this Court grant certiorari, and reverse the judgment of conviction based upon the papers now before it. Alternatively, full con-

sideration should be given to the serious errors of su
stance and procedure committed in this cause and the
should be further briefing and argument.

Respectfully submitted,

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